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7 TONY RAY JONES,
8 Petitioner,
9 v.
10 J. SOTO,
11 Respondent.

Case No. [15-cv-01883-EMC](#)

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17 **ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

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19 **I. INTRODUCTION**

20 Tony Ray Jones filed this *pro se* action for a writ of habeas corpus under 28 U.S.C. § 2254.
21 The Court issued an order to show cause why the writ should not be granted. Respondent has filed
22 an answer and Mr. Jones has filed a traverse. For the reasons explained below, the petition will be
23 **DENIED.**

24
25 **II. BACKGROUND**

26
27 A. The Crime

28 The California Court of Appeal described the criminal episode that led to Mr. Jones'
conviction:

29
30 On the evening of February 19, 2012, Armando Cuatlatl was about
31 to enter an Oakland liquor store when two Black males came up to
32 him. Defendant, whom Cuatlatl positively identified in court,
33 pointed a gun at him. Defendant was wearing a black jacket, black
34 gloves, and a black bandana over the lower half of his face. The
35 other man took \$40 and an ATM card from Cuatlatl. The two then
36 fled on foot.

37 James Gates and Nakia Dickens were driving in Gates's van about a
38 block from the liquor store. Gates had stopped the vehicle and was
39 talking to an acquaintance when defendant—whom Gates knew and
40 who he positively identified in court—and another Black male came

1 running up to the van from the direction of the liquor store. Dickens
2 also identified defendant as the one of the men who entered the van
3 carrying a gun.
4

5 Defendant identified himself to Gates, and told him to open the
6 door. Defendant was wearing black gloves, had a black bandana
7 over his face, and was carrying a gun. Defendant and other man
8 entered the van.

9 The men's entry was observed by Oakland Police Officer Cesar
10 Garcia, who believed he might be witnessing a carjacking or some
11 other crime. As the van began moving, Officer Garcia followed.
12 When defendant caught sight of Garcia's cruiser, he stated "I ain't
13 about to go back to jail." Garcia radioed for assistance to halt the
14 vehicle.

15 Gates told defendant to get out of the vehicle, but Dickens kept
16 driving because Gates was afraid of defendant, who was "fumbling
17 with the gun." Gates repeated that defendant had to get out.
18 Defendant made remarks which Gates and Dickens interpreted as
19 evidencing defendant's resolve to confront the officers.

20 Officer Garcia observed defendant roll out of the moving van,
21 holding a gun. Defendant, still holding the gun, fled on foot.
22 Officer Garcia left his vehicle and followed. During the ensuing
23 chase, Officer Garcia, believing defendant was about to shoot him,
24 shot defendant. When defendant was taken into custody, he was
25 wearing gloves and a bandana, but no gun was in his possession.

26 Another officer discovered a gun along the route of defendant's foot
27 chase. Upon examination, no fingerprints or usable DNA linked
28 defendant to the weapon. However, a fingerprint of Pablo
Rodriguez was found on the gun's magazine. Rodriguez testified
that he had shown the gun to defendant prior to it being stolen.

29 *People v. Jones*, Cal. Ct. Appeal No. A138504, May 6, 2014 opinion ("Cal. Ct. App. Opinion") at
30 1-2.

31 B. Procedural History

32 Following a jury trial in Alameda County Superior Court, Mr. Jones was convicted of
33 second degree robbery and possession of a firearm by a felon. *See* Cal. Penal Code §§ 211,
34 29800(a)(1). The jury also found that he had used a firearm during the commission of the robbery.
35 Mr. Jones admitted that he had suffered two prior prison terms. On April 25, 2013, he was
36 sentenced to a total of 15 years and eight months in prison.

37 Mr. Jones appealed. The California Court of Appeal affirmed the judgment of conviction
38 on May 6, 2014. The California Supreme Court denied his petition for review on July 9, 2014.

39 Mr. Jones then filed this action. In his federal petition for writ of habeas corpus, he alleged

1 that his Fourteenth Amendment right to due process was violated by the admission of evidence of
2 his “uncharged prior juvenile carjacking offense from 2003.” Docket No. 1 at 11. Mr. Jones also
3 alleged that the admission of this evidence violated his state law rights. The Court ordered
4 Respondent to respond to the federal due process claim and dismissed the state law claim because
5 federal habeas relief is not available for state law errors. *See* Docket No. 5 at 2. Respondent has
6 filed an answer to the petition, and Mr. Jones has filed a traverse.

7 **III. JURISDICTION AND VENUE**

8 This Court has subject matter jurisdiction over this habeas action for relief under 28 U.S.C.
9 § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the petition concerns the
10 conviction and sentence of a person convicted in Alameda County, California, which is within this
11 judicial district. 28 U.S.C. §§ 84, 2241(d).

12 **IV. STANDARD OF REVIEW**

13 This Court may entertain a petition for writ of habeas corpus “in behalf of a person in
14 custody pursuant to the judgment of a State court only on the ground that he is in custody in
15 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

16 The Antiterrorism And Effective Death Penalty Act of 1996 (“AEDPA”) amended § 2254
17 to impose new restrictions on federal habeas review. A petition may not be granted with respect to
18 any claim that was adjudicated on the merits in state court unless the state court’s adjudication of
19 the claim: “(1) resulted in a decision that was contrary to, or involved an unreasonable application
20 of, clearly established Federal law, as determined by the Supreme Court of the United States; or
21 (2) resulted in a decision that was based on an unreasonable determination of the facts in light of
22 the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

23 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court
24 arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if
25 the state court decides a case differently than [the] Court has on a set of materially
26 indistinguishable facts.” *Williams (Terry) v. Taylor*, 529 U.S. 362, 412-13 (2000).

27 “Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if
28 the state court identifies the correct governing legal principle from [the Supreme] Court’s

1 decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.
2 "[A] federal habeas court may not issue the writ simply because that court concludes in its
3 independent judgment that the relevant state-court decision applied clearly established federal law
4 erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. "A
5 federal habeas court making the 'unreasonable application' inquiry should ask whether the state
6 court's application of clearly established federal law was 'objectively unreasonable.'" *Id.* at 409.

7 The state-court decision to which § 2254(d) applies is the "last reasoned decision" of the
8 state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Barker v. Fleming*, 423 F.3d
9 1085, 1091-92 (9th Cir. 2005). "When there has been one reasoned state judgment rejecting a
10 federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest
11 upon the same ground." *Ylst*, 501 U.S. at 803. The presumption that a later summary denial rests
12 on the same reasoning as the earlier reasoned decision is a rebuttable presumption and can be
13 overcome by strong evidence. *Kernan v. Hinojosa*, No. 15-833, slip op. at 3 (U.S. May 16, 2016).
14 Although *Ylst* was a procedural default case, the "look through" rule announced there has been
15 extended beyond the context of procedural default and applies to decisions on the merits. *Barker*,
16 423 F.3d at 1092 n.3. In other words, when the last reasoned decision is a decision on the merits,
17 the habeas court can look through later summary denials to apply § 2254(d) to the last reasoned
18 decision.

19 V. DISCUSSION

20 A. Due Process Claim Based On Admission Of Evidence Of Prior Bad Act

21 1. Background

22 Before trial began, the prosecution filed a motion *in limine* to admit evidence of a 2003
23 carjacking and robbery committed by Mr. Jones as evidence of intent and a common plan.¹ *See*
24 CT 421-35. The prosecution's motion was made under California Evidence Code section 1101(b).
25 The general rule, stated in section 1101(a), is that evidence of a person's character (such as a prior
26 bad act) is generally inadmissible to prove a defendant's conduct on a specified occasion. Section

27
28 ¹ The prosecution also moved for the admission of evidence of a January 2012 robbery, but the trial court ruled that incident inadmissible.

1 1101(b) provides the following exceptions to that general rule: "Nothing in this section prohibits
2 the admission of evidence that a person committed a crime, civil wrong, or other act when relevant
3 to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity,
4 absence of mistake or accident . . .) other than his or her disposition to commit such an act." Cal.
5 Evid. Code § 1101(b).

6 At the hearing on the motion *in limine*, the only information about the 2003 crime was the
7 following description provided in the prosecution's motion:

8 On February 23, 2003, around 11 p.m., defendant and an African
9 American male adult approached victim Robert Washington's car as
10 he was exiting a gas station in Richmond. The victim was 70 years
11 old at the time and was alone in his vehicle. As defendant walked
12 [past] Mr. Washington's car at the exit of the gas station, defendant
13 asked what time it was and if he could borrow Mr. Washington's
14 phone. The defendant was dressed in dark clothing at the time. Mr.
15 Washington let defendant and the other male use his phone, but after
16 a few minutes he asked for his phone back so he could leave. At that
17 point, the second male approached Mr. Washington with a black
18 semi-automatic gun and pointed it at Mr. Washington. The men
19 ordered Mr. Washington out of the car and the defendant got in the
20 passenger side door. Both defendant and the other men [man?] drove
21 off, stealing Mr. Washington's car and his cell phone. Mr.
22 Washington called the police from a payphone to report the crime.
23 Defendant was subsequently identified in a photo lineup. (CT 424.)

24 Defense counsel opposed the motion to admit the evidence, arguing that the incident was
25 too remote in time to be admissible. RT 73. The prosecution responded that Mr. Jones had not
26 led a crime-free life in the interim between the 2003 carjacking/robbery and the 2012 robbery,
27 stating that "almost every two years, he's committed and been convicted of another felony since
28 that happened." *Id.*

29 The trial court ruled *in limine* that evidence of the 2003 carjacking/robbery was admissible
30 under California Evidence Code section 1101(b) as evidence of intent and a common plan. The
31 trial court explained that there had been a conviction, and the 2003 crime "looks to the Court to be
32 material to the issue of intent, intent to deprive the owner of possessions permanently. And it also
33 is relevant to prove intent, common plan. So the Court feels that the probative value in this
34 particular incident outweighs the prejudicial effect. Sufficiently similar. It's highly probative. And
35 the Court would allow it to be used in the case-in-chief to be proved by a preponderance of the

1 evidence.” RT 73-74.

2 As a result of that ruling, at Mr. Jones’ trial for the 2012 robbery of Mr. Cuatlatl, Robert
3 Washington was called to testify about being the victim of the 2003 carjacking/robbery/robbery.
4 Mr. Washington’s testimony differed in several ways from above-quoted description of the 2003
5 crime that had been presented at the *in limine* hearing. His testimony at trial was that “on the
6 morning of February 23, 2003, he was sitting in his car at a gas station in Richmond when he was
7 approached by two Black teenagers, one male, one female. After Washington allowed the female
8 to use his cell phone, the male pointed a gun at Washington, ordered him out of the car, and drove
9 away in the car. Washington identified defendant as the gunman.” Cal. Ct. App. Opinion at 2-3.

10 On appeal, Mr. Jones argued that the trial court’s ruling was an abuse of discretion under
11 California Evidence Code sections 1101 and 352, and that it violated his federal constitutional
12 right to a fair trial. Mr. Jones urged that the charged crime and the 2003 carjacking/robbery were
13 not sufficiently similar to prove that he acted with a common plan, and that the evidence of the
14 2003 crime should have been excluded under California Evidence Code section 352 because it was
15 cumulative evidence of intent.²

16 The California Court of Appeal explained first that it was required to evaluate the trial
17 court’s *in limine* ruling in the context of the record before the trial court at the *in limine* hearing.
18 This was required because the defense never raised an objection at trial that the evidence
19 introduced at trial had significant differences from the description of the incident presented in the
20 motion *in limine* upon which the trial court had relied when it issued its ruling that the evidence
21 about the 2003 crime was admissible. Cal. Ct. App. Opinion at 5-7. The California Court of
22 Appeal then rejected Mr. Jones’ challenge to the trial court’s evidentiary ruling. The state
23 appellate court explained the state law principles regarding the admission of evidence to prove
24 intent and common plan and upheld the trial court’s ruling under California Evidence Code

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26
27 ² California Evidence Code section 352 provides: “The court in its discretion may exclude
28 evidence if its probative value is substantially outweighed by the probability that its admission
will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice,
of confusing the issues, or of misleading the jury.”

1 section 1101(b).³ The state appellate court determined that “[t]here are sufficient common
 2 features that the evidence would support a rational inference that there was a plan. It would also
 3 satisfy the lesser showing required for a rational inference that defendant ‘probably harbor[ed] the
 4 same intent in each instance.’” *Id.* at 8 (quoting *People v. Ewoldt*, 7 Cal. 4th 380, 402 (Cal. 1994)
 5 (alteration in original)). The California Court of Appeal further determined that the evidence was
 6 not unduly prejudicial such that it should have been excluded under California Evidence Code
 7 section 352.

8 The California Court of Appeal also rejected the argument that the admission of the
 9 evidence violated Mr. Jones’ state and federal due process rights, concluding with a determination
 10

11 ³ The California Court of Appeal discussed the similarities needed to prove identity and common
 12 plan:

13 “The least degree of similarity (between the uncharged act and the
 14 charged offense) is required in order to prove intent. [Citation.]
 15 ‘[T]he recurrence of a similar result ... tends (increasingly with each
 16 instance) to negative accident or inadvertence or self-defense or
 17 good faith or other innocent mental state, and tends to establish
 18 (provisionally, at least, though not certainly) the presence of the
 19 normal, i.e., criminal, intent accompanying such an act....’
 20 [Citation.] In order to be admissible to prove intent, the uncharged
 21 misconduct must be sufficiently similar to support the inference that
 22 the defendant ‘“probably harbor[ed] the same intent in each
 23 instance.” [Citations.]’ [Citation.]

24 “A greater degree of similarity is required in order to prove the
 25 existence of a common design or plan. As noted above, in
 26 establishing a common design or plan, evidence of uncharged
 27 misconduct must demonstrate ‘not merely a similarity in the results,
 28 but such a concurrence of common features that the various acts are
 naturally to be explained as caused by a general plan of which they
 are the individual manifestations.’ [Citation.] ‘[T]he difference
 between requiring similarity, for acts negativing innocent intent, and
 requiring common features indicating common design, for acts
 showing design, is a difference of degree rather than of kind; for to
 be similar involves having common features, and to have common
 features is merely to have a high degree of similarity.’ [Citations.]

25 “To establish the existence of a common design or plan, the
 26 common features must indicate the existence of a plan rather than a
 27 series of similar spontaneous acts, but the plan thus revealed need
 28 not be distinctive or unusual.... Unlike evidence of uncharged acts
 used to prove identity, the plan need not be unusual or distinctive; it
 need only exist to support the inference that the defendant employed
 that plan in committing the charged offense. [Citation.]” (*People v.*
Ewoldt (1994) 7 Cal.4th 380, 402–403.)

1 that, even if there had been an error, it was harmless:

2 ‘The admission of relevant evidence will not offend due process
3 unless the evidence is so prejudicial as to render the defendant’s trial
4 fundamentally unfair.’ [Citation.]” (*People v. Jablonski* (2006) 37
Cal.4th 774, 805.)

5 The evidence of Washington’s robbery was not the sort to unhinge
6 an Alameda County jury of this day and age. The victim was
7 elderly, but no physical harm was inflicted upon him. The threat of
8 such harm, even if only implicit, was undoubtedly traumatic to
9 Washington, but that type of threat almost defines the crimes of
10 robbery and carjacking. (*See In re Travis W.* (2003) 107 Cal.App.4th
11 368, 375 [“as it is with robbery, the threat of force is implicit in
12 carjacking”].) The robbery of Washington was nine years before the
13 charged incident, but it was not stale as a matter of law. Although
14 evidence of the Washington robbery did ultimately prove to be
15 cumulative to other evidence introduced at trial on the issue of
16 defendant’s intent, this was not known to the trial court when it
17 made its ruling, and does not apply to the evidence being used on
18 the issue of common plan. In light of all of these circumstances, we
19 cannot conclude that the trial court’s ruling amounted to an abuse of
20 the court’s discretion or tipped the trial into fundamental unfairness.

21 Even if we assumed, solely for purposes of this appeal, that the trial
22 court’s ruling did qualify as an abuse of discretion, such error would
23 not command reversal. The case against defendant, while not
24 overwhelming, was certainly more than commonly strong.
25 Defendant was positively identified by the victim and others as
26 armed and fleeing from the scene. Defendant made statements after
27 the robbery indicating a consciousness of guilt. Defendant was
28 under observation virtually from the robbery to his speedy
apprehension, still wearing the distinctive bandana. Thus, the
assumed error would not be prejudicial according to state or federal
standards. (*See People v. Cole* (2004) 33 Cal.4th 1158, 1195.)

Cal. Ct. App. Opinion at 8-9.

The California Court of Appeal’s decision is the last reasoned decision from a state court. This Court therefore considers whether that decision was contrary to, or an unreasonable application of, clearly established federal law as set forth by the U.S. Supreme Court. *See Ylst v. Nunnemaker*, 501 U.S. at 803; *Barker*, 423 F.3d at 1092 n.3.

2. Analysis of Federal Due Process Claim

Mr. Jones contends that the admission of evidence of the 2003 carjacking/robbery violated his due process right to a fair trial because it tended to show that he had a propensity to commit robbery, i.e., that he was the sort of person who carried around deadly weapons and used them. *See* Docket No. 8-35 at 35.

1 The United States Supreme Court has never held that the introduction of propensity or
2 other allegedly prejudicial evidence violates due process. *See Estelle v. McGuire*, 502 U.S. 62,
3 68-70 (1991). In fact, *Estelle v. McGuire* specifically left open the question regarding propensity
4 evidence. *See id.* at 75 n.5 (“we express no opinion on whether a state law would violate the Due
5 Process Clause if it permitted the use of ‘prior crimes’ evidence to show propensity to commit a
6 charged crime”).

7 In *Estelle v. McGuire*, the defendant was on trial for murder of his infant daughter after she
8 was brought to a hospital and died from numerous injuries suggestive of recent child abuse.
9 Defendant told police the injuries were accidental. Evidence was admitted at trial that the coroner
10 discovered during the autopsy older partially healed injuries that had occurred 6-7 weeks before
11 the child’s death. *Id.* at 65. Evidence of the older injuries was introduced to prove “battered child
12 syndrome,” which “exists when a child has sustained repeated and/or serious injuries by
13 nonaccidental means.” *Id.* at 66. The state appellate court had held that the proof of prior injuries
14 tending to establish battered child syndrome was proper under California law. *Id.* In federal
15 habeas proceedings, the Ninth Circuit found a due process violation based in part on its
16 determination that the evidence was improperly admitted under state law. *Id.* at 66-67. The U.S.
17 Supreme Court first held that the Ninth Circuit had erred in inquiring whether the evidence was
18 properly admitted under state law because ““federal habeas corpus relief does not lie for errors of
19 state law.”” *Id.* at 67. The Supreme Court then explained:

20 The evidence of battered child syndrome was relevant to show
21 intent, and nothing in the Due Process Clause of the Fourteenth
22 Amendment requires the State to refrain from introducing relevant
23 evidence simply because the defense chooses not to contest the
24 point. [¶] Concluding, as we do, that the prior injury evidence was
25 relevant to an issue in the case, we need not explore further the
26 apparent assumption of the Court of Appeals that it is a violation of
27 the due process guaranteed by the Fourteenth Amendment for
28 evidence that is not relevant to be received in a criminal trial. We
hold that McGuire’s due process rights were not violated by the
admission of the evidence. *See Spencer v. Texas*, 385 U.S. 554, 563–
564, 87 S.Ct. 648, 653–654, 17 L.Ed.2d 606 (1967) (“Cases in this
Court have long proceeded on the premise that the Due Process
Clause guarantees the fundamental elements of fairness in a criminal
trial. . . . But it has never been thought that such cases establish this
Court as a rulemaking organ for the promulgation of state rules of

criminal procedure”).

Estelle v. McGuire, 502 U.S. at 70 (omission in original).

The cited case, *Spencer v. Texas*, 385 U.S. at 563, held that the admission of evidence of prior convictions did not violate due process. The Supreme Court explained in *Spencer* that, although there may have been other, perhaps better, ways to adjudicate the existence of prior convictions (e.g., a separate trial on the priors after the trial on the current substantive offense resulted in a guilty verdict), Texas' use of prior crimes evidence in a "one-stage recidivist trial" did not violate due process. *Id.* at 563-64. "In the face of the legitimate state purpose and the long-standing and widespread use that attend the procedure under attack here, we find it impossible to say that because of the possibility of some collateral prejudice the Texas procedure is rendered unconstitutional under the Due Process Clause as it has been interpreted and applied in our past cases." *Id.* at 564.

Estelle v. McGuire also cited to *Lisenba v. California*, 314 U.S. 219, 228 (1941), in support of the conclusion that the introduction of the battered child syndrome evidence did not so infuse the trial with unfairness as to deny due process of law. *See Estelle v. McGuire*, 502 U.S. at 75. In *Lisenba*, the Supreme Court rejected a claim that the admission of inflammatory evidence violated the defendant's due process rights. The evidence at issue in *Lisenba* was live rattlesnakes and testimony about them to show they had been used by the defendant to murder his wife. "We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence. We cannot hold, as petitioner urges, that the introduction and identification of the snakes so infused the trial with unfairness as to deny due process of law. The fact that evidence admitted as relevant by a court is shocking to the sensibilities of those in the courtroom cannot, for that reason alone, render its reception a violation of due process." *Lisenba*, 314 U.S. at 228-29.

These three Supreme Court cases declined to hold that the admission of prejudicial or propensity evidence violates the defendant's due process rights. No Supreme Court cases since *Estelle v. McGuire* have undermined the holdings in these three cases. In other words, there is no Supreme Court holding that the admission of prejudicial or propensity evidence violates due

1 process.

2 When the U.S. Supreme Court “cases give no clear answer to the question presented, let
3 alone one in [the petitioner’s] favor, ‘it cannot be said that the state court unreasonabl[y] appli[ed]
4 clearly established Federal law.’ . . . Under the explicit terms of § 2254(d)(1), therefore, relief is
5 unauthorized.” *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (alterations in original) (quoting
6 *Carey v. Musladin*, 549 U.S. 70, 77 (2006), and 28 U.S.C. § 2254(d)(1)).

7 Mr. Jones cannot obtain federal habeas relief on his claim that the admission of the
8 evidence violated his right to due process because it showed a propensity to commit robbery.
9 Relief is precluded because, as discussed above, the United States Supreme Court has never held
10 that the introduction of propensity or other allegedly prejudicial evidence violates due process.
11 See *Wright*, 552 U.S. at 125-26 (no relief on denial of counsel claim under *United States v.*
12 *Cronic*, 466 U.S. 648 (1984), because Supreme Court had never determined the standard to apply
13 where attorney appeared at hearing by speakerphone); *see, e.g., Foy v. Gipson*, 609 F. App’x 903
14 (9th Cir. 2015) (no habeas relief on claim that admission of propensity evidence (i.e., that
15 defendant assaulted another woman after he assaulted victim in this case) violated defendant’s
16 right to due process because *Estelle v. McGuire*’s reservation of the question whether propensity
17 evidence violates due process “forecloses the conclusion that the state court’s decision was
18 contrary to, or an unreasonable application of, clearly established federal law); *Munoz v. Gonzales*,
19 596 F. App’x 588 (9th Cir. 2015) (even if admission of evidence of prior auto theft was
20 improperly admitted to show propensity, habeas relief foreclosed because *Estelle v. McGuire*
21 reserved the question whether propensity evidence violated due process); *Holley v. Yarborough*,
22 568 F.3d 1091, 1101 (9th Cir. 2009) (denying habeas relief upon finding that trial court’s
23 admission of irrelevant pornographic materials was “fundamentally unfair” under Ninth Circuit
24 precedent but not contrary to, or an unreasonable application of, clearly established Federal law
25 under § 2254(d)); *Alberni v. McDaniel*, 458 F.3d 860, 865 (9th Cir. 2006) (denying habeas relief
26 on claim that due process was violated by admission of evidence of defendant’s past violent
27 actions and explosive temper to show propensity due to *Estelle v. McGuire*’s reservation of the
28 question whether propensity evidence violates due process); *Moses v. Payne*, 555 F.3d 742, 760

1 (9th Cir. 2009) (holding that, where balancing test for excluding evidence is creation of Ninth
2 Circuit law and Supreme Court has not directly considered whether trial court's exercise of
3 discretion to exclude evidence violated defendants' constitutional right to present evidence, state
4 court's failure to use Ninth Circuit's balancing test is not contrary to or an unreasonable
5 application of clearly established Supreme Court precedent).

6 The Supreme Court has established a general principle of "fundamental fairness," i.e.,
7 evidence that "is so extremely unfair that its admission violates 'fundamental conceptions of
8 justice'" may violate due process. *Dowling v. United States*, 493 U.S. 342, 352 (1990) (quoting
9 *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (due process was not violated by admission of
10 evidence to identify perpetrator and link him to another perpetrator even though the evidence also
11 was related to crime of which defendant had been acquitted); *see, e.g., Gimenez v. Ochoa*, No. 14-
12 55681, slip op. at 17 (9th Cir. May 9, 2016) (petitioner who showed that a vigorous debate had
13 sprung up as to the validity of the "triad-only" theory of shaken baby syndrome in the years since
14 his murder conviction, "failed to show that permitting the prosecution's experts to testify based on
15 a triad-only theory of [shaken baby syndrome] was 'so extremely unfair that it[] . . . violated
16 fundamental conceptions of justice.'"). Thus, apart from the alleged impropriety of admitting
17 propensity evidence, a court may consider whether the evidence was "so extremely unfair that its
18 admission violates 'fundamental conceptions of justice.'" *Dowling*, 493 U.S. at 352. Mr. Jones
19 does not identify any vice in the evidence other than that it tended to show his propensity to
20 commit robberies, and does not meet the very demanding standard of being so extremely unfair
21 that its admission violates fundamental conceptions of justice.

22 In this circuit, the admission of prejudicial evidence may make a trial fundamentally unfair
23 and violate due process "[o]nly if there are *no* permissible inferences the jury may draw from the
24 evidence." *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). "Evidence introduced by
25 the prosecution will often raise more than one inference, some permissible, some not; we must
26 rely on the jury to sort them out in light of the court's instructions. Only if there are
27 *no* permissible inferences the jury may draw from the evidence can its admission violate due
28 process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.'

1 Only under such circumstances can it be inferred that the jury must have used the evidence for an
 2 improper purpose.” *Jammal*, 926 F.2d at 920 (internal citation and footnote omitted).⁴

3 Here, the jury could draw the inference of a common plan and intent to steal from the
 4 evidence of the 2003 carjacking/robbery. Although the trial testimony of Mr. Washington showed
 5 the similarities between the 2003 carjacking/robbery and the 2012 robbery to be weaker than
 6 thought when the trial court ruled *in limine* that the evidence was admissible, there still were
 7 several similarities between the two crimes. Mr. Washington’s testimony about the 2003 crime
 8 showed similarities between the 2003 carjacking/robbery and the 2012 robbery that would have
 9 supported rational inferences of a common plan in the two crimes and that Mr. Jones harbored the
 10 same intent in each crime. Both the 2003 and 2012 crimes involved a 2-on-1 approach (i.e., two
 11 perpetrators robbing one victim); both involved a single male victim who was alone; and both
 12 involved the brandishing of a pistol by defendant to effectuate the taking of the victim’s property.
 13 Because the inferences of a common plan and intent were permissible, the state appellate court did
 14 not unreasonably apply Supreme Court authorities in holding that the admission of the evidence of
 15 the 2003 carjacking/robbery did not violate due process. *See Jammal*, 926 F.2d at 920.

16

17 ⁴ In *Jammal*, the police found a gun, \$47,000 and drugs in the trunk of Jammal’s stolen car when
 18 they arrested Willis, who had stolen Jammal’s car; 18 months later, the police found \$135,000 (but
 19 no drugs) in the trunk of Jammal’s car when they arrested Jammal. At trial, Willis said he had no
 20 idea the drugs and money were in the trunk of Jammal’s stolen car until police opened it. The
 21 prosecution urged the jury to infer that both the drugs and the \$47,000 found in the trunk of
 22 Jammal’s car when Willis was arrested belonged to Jammal since Jammal later was arrested also
 23 with a large stash of cash in his trunk. Jammal unsuccessfully objected that this evidence
 24 effectively branded him a drug dealer and was therefore inadmissible character evidence. The
 Ninth Circuit explained that state law evidence rules were beside the point in a federal habeas
 proceeding and any problem in the jury inferring that Jammal had put the \$47,000 and drugs in the
 car earlier (even if impermissible under state law) was not a constitutional problem because the
 inference that Jammal had put both the \$47,000 and drugs in the trunk on an earlier occasion was a
 “rational inference” the jury could draw from the evidence that he was caught with \$135,000 in his
 trunk. *Jammal*, 926 F.2d at 920.

25 *Jammal* is one of the few cases that gives any guidance as to what might amount to the
 26 introduction of evidence that might amount to fundamental unfairness. The Ninth Circuit
 27 continues to use the *Jammal* “permissible inference” test in habeas cases governed by the AEDPA.
 28 *See, e.g., Noel v. Lewis*, 605 F. App’x 606, 608 (9th Cir. 2015) (admission of gang evidence did
 not violate due process); *Lundin v. Kernan*, 583 F. App’x 686, 687 (9th Cir. 2014) (citing *Jammal*
 and concluding that admission of graffiti evidence did not violate due process because there were
 permissible inferences to be drawn); *Gonzalez v. Knowles*, 515 F.3d 1006, 1011 (9th Cir. 2008)
 (citing *Jammal* and concluding that evidence of prior bad acts did not violate due process).

1 Mr. Jones contends that evidence of intent was unnecessary because it was not really
2 disputed at trial at which the main issue was the identity of the robber. However, at trial, defense
3 counsel's closing argument did not concede the issue. Defense counsel actually intimated that
4 perhaps a robbery had not actually occurred as he pursued his theme that the Oakland Police
5 Department was attempting to do an after-the-fact justification for shooting Mr. Jones. *See* RT
6 1701 (defense counsel argues, "Mr. Cuatlatl, if he was robbed, he was robbed by two different
7 individuals."); RT 1712 (defense counsel argues that the driver and owner of the white van were
8 not charged with being accomplices "because the district attorney knows that there was no
9 robbery" and neither was held accountable "because there was no robbery and they know that").
10 Although it may not have been the focal point, intent was an issue that the prosecution did need to
11 prove because it was an element of the offense. *See* CT 585 (to prove robbery, the People must
12 prove, among other things, "[w]hen the defendant used force or fear to take the property, he
13 intended to deprive the owner of it permanently"). Regardless of the centrality of the issue of
14 intent, the Supreme Court has observed that the Fourteenth Amendment Due Process Clause does
15 not require "the State to refrain from introducing relevant evidence simply because the defense
16 chooses not to contest the point." *Estelle v. McGuire*, 502 U.S. at 70.

17 Any possibility that the evidences made the trial fundamentally unfair was even more
18 remote because the jury was properly instructed on the limited purpose for which it could use the
19 evidence about the 2003 carjacking/robbery.⁵ The jury instruction merely permitted, rather than

20 ⁵ The jury was given the following modified version of CALCRIM 375, a pattern instruction:

21 The People presented evidence that the defendant committed the
22 offenses of Robbery and Carjacking that were not charged in this
23 case against Robert Washington.

24 You may consider this evidence only if the People have proved by a
25 preponderance of the evidence that the defendant in fact committed
26 these offenses. Proof by a preponderance of the evidence is a
27 different burden of proof than proof beyond a reasonable doubt. A
28 fact is proved by a preponderance of the evidence if you conclude
that it is more likely than not that the fact is true.

29 If the People have not met this burden, you must disregard this
30 evidence entirely.

1 directed, the jury to use the 2003 carjacking/robbery evidence as evidence of common plan or
2 intent and only upon the specified circumstances. Moreover, the prosecutor's comments about the
3 2003 crime were brief, were based on the evidence presented at trial, and were not inconsistent
4 with the jury instruction. *See* RT 1682-84. The prosecutor only returned to the issue of the 2003
5 crime in her rebuttal to respond to defense counsel's effort to misdirect the jury by arguing that
6 Mr. Jones had already been punished for the 2003 crime. *Compare* RT 1695 (defense counsel
7 argues that the 2003 carjacking evidence should make the jurors "angry" because he was a minor,
8 had been punished – "gave back to society" – "And what happened to double jeopardy?") *with*
9 RT 1751 (prosecutor arguing in rebuttal, "I just want to be clear about the evidence that came out
10 about Robert Washington. No one is prosecuting the defendant again for that crime. When the
11 defense attorney was throwing out double jeopardy, I just want to make sure you know. That is
12 not a decision you have to make here, but that is evidence that is admissible in cases to show
13 someone's intent and their common plan."), *and* RT 1755 (prosecutor arguing in rebuttal that "the
14 prior with Mr. Washington. We know that this is the common plan and the intent of the
15 defendant."). Mr. Jones does not find fault with the jury instruction or the prosecutor's closing
16 argument.

17
18 If you decide that the defendant committed the offenses, you may,
19 but are not required to, consider that evidence for the limited
purpose of deciding whether or not:

20 The defendant acted with the intent to rob Armando Cuatlatl
21 in this case; or

22 The defendant had a plan to commit the offenses alleged in
this case.

23 Do not consider this evidence for any other purpose except for the
24 above listed limited purposes.

25 If you conclude that the defendant committed the uncharged
26 offenses, that conclusion is only one factor to consider along with all
the other evidence. It is not sufficient by itself to prove that the
27 defendant is guilty of Second Degree Robbery. The People must
still prove every charge beyond a reasonable doubt.

28 CT 584.

1 The admission of the evidence did not render his trial fundamentally unfair. “Even if there
2 are no permissible inferences the jury can draw from the evidence in question, due process is
3 violated only if the evidence is ‘of such quality as necessarily prevents a fair trial.’” *Hovey v.*
4 *Ayers*, 458 F.3d 892, 923 (9th Cir. 2006) (quoting *Jammal*, 926 F.2d at 920); *see e.g., id.* (due
5 process not violated by admission of “emotionally compelling” evidence showing victim as a
6 young girl, even though it was irrelevant); *Plascencia v. Alameida*, 467 F.3d 1190, 1203-04 (9th
7 Cir. 2006) (citing *Jammal* and concluding that some evidence about the use of a drug was
8 irrelevant but its admission did not make the trial fundamentally unfair). As the California Court
9 of Appeal explained, the 2003 crime was not more inflammatory than the charged conduct and,
10 having the attributes of a typical carjacking and robbery, “was not the sort to unhinge an Alameda
11 County jury of this day and age.” Cal. Ct. App. Opinion at 9.

12 “[E]valuating whether a rule application was unreasonable requires considering the rule’s
13 specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-
14 by-case determinations.” *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). Bearing in mind
15 the extremely general nature of the Supreme Court’s articulation of a principle of “fundamental
16 fairness” – i.e., evidence that “is so extremely unfair that its admission violates ‘fundamental
17 conceptions of justice’” may violate due process, *Dowling*, 493 U.S. at 352, – the California Court
18 of Appeal’s rejection of Mr. Jones’ due process claim was not contrary to or an unreasonable
19 application of clearly established federal law as set forth by the Supreme Court. *See*
20 *generally Holley*, 568 F.3d at 1101 (denying writ because, although Supreme Court “has been
21 clear that a writ should be issued when constitutional errors have rendered the trial fundamentally
22 unfair, it has not yet made a clear ruling that admission of irrelevant or overtly prejudicial
23 evidence constitutes a due process violation sufficient to warrant issuance of the writ.” (internal
24 citation omitted)).

25 B. No Certificate of Appealability

26 A certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c). This is not a case in
27 which “reasonable jurists would find the district court’s assessment of the constitutional claims
28 debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, a certificate of

1 appealability is **DENIED**.

2 **VI. CONCLUSION**

3 For the foregoing reasons, the petition for writ of habeas corpus is **DENIED** on the merits.
4 The Clerk shall close the file.

5

6 **IT IS SO ORDERED.**

7

8 Dated: June 30, 2016



9

10 EDWARD M. CHEN
United States District Judge